Supreme Court, U.S.
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No. 00-1497

IN THE

Supreme Court of the United States

CITY OF YONKERS,

Petitioner,

v.

UNITED STATES AND YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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4 pp

Pursuant to Supreme Court Rule 15(8), petitioner City of Yonkers files this supplemental brief in support of its pending petition for a writ of certiorari. Yonkers seeks to bring to the Court's attention the recent decision of the Court of Appeals for the Eleventh Circuit in *Johnson v. Board of Regents of the University of Georgia*, Nos. 00-14340 and 00-14382, __ F.3d __, 2001 U.S. App. LEXIS 19154 (11th Cir. August 27, 2001). Yonkers contends that the Eleventh Circuit's decision in *Johnson* conflicts with the decision of the Second Circuit that is the subject of its petition.

In its petition, Yonkers demonstrated that the Second Circuit's decision improperly applied the narrow-tailoring prong of constitutional strict scrutiny analysis and approved a remedy that was beyond the district court's remedial authority. Specifically, Yonkers contends that the Second Circuit failed to engage in a "thorough and complete analysis" of a racial classification to ensure that such a remedy is only used as a "last resort." Pet., 14-18. Yonkers urged that further explanation of the level of inquiry and elaboration of the *Paradise* factors is necessary to provide direction to lower courts on the proper application of strict scrutiny to a racial classification. Pet. 24-29.

In *Johnson*, the Eleventh Circuit made clear that the narrow tailoring requirement of strict scrutiny requires an inquiry that is "intrusive, and focused very closely and in a very precise way on the specific terms of the regulations or policy under review . . ." Slip op., 36. The *Johnson* court recognized that the *Paradise* factors are only guidelines and require adjustment based on the nature of the racial classification under review. Slip op., 38-40. Indeed, the Eleventh Circuit noted it does ". . . not view these factors as determinative in all instances, but they do provide a useful analytical structure . . ." *Johnson*, slip op., 40.

The Eleventh Circuit applied the *Paradise* factors, as modified to fit the context of public university admissions, in a very thorough and searching manner to the factual record to determine that the challenged policy used race in an inflexible and arbitrary manner that was fatal to the policy's constitutionality. Slip op., 44-50.

The Eleventh Circuit's thorough and searching scrutiny of the racial classification at issue in *Johnson* stands in marked contrast to the Second Circuit's deferential review of the racial classification at issue in *Yonkers*. *See* pet. at 18, 27-29. Review by this Court would resolve this stark difference in approach and would assist lower courts in understanding the searching and thorough review necessary to ensure that, in those rare instances when constitutionally permissible, a governmentally-imposed racial classification is appropriately tailored to further a compelling interest. As demonstrated in its petition, Yonkers contends that the racial classification imposed here unlawfully requires Yonkers to attain a goal of racial balancing of local neighborhood housing patterns.[1]

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1. Petitioner also notes that subsequent to the Court's conference of this case on June 28, 2001, the Solicitor General filed the merits brief for the respondents in *Adarand Constructors v. Mineta*, No. 00-730, wherein the Solicitor General claimed the Court should not reach the "serious constitutional issues raised by petitioner" due to issues of standing and mootness. On that basis, the government claimed that *Adarand* is an "abstract vehicle" to address the substantive questions before the Court. Those concerns further demonstrate how *Yonkers* provides a clear and uncomplicated opportunity for this Court to squarely address the constitutional issues that are of national importance in these cases.

Respectfully submitted,

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